

1995

PDQ Lube Center, Inc., a Utah Corporation v. R.
Lowell Huber; June T. Bowen, the Estate of Darrell
J. Bowen, Dennis Greene, Pete Riggs, Bog Riggs,
Reed Hooley, Troy Hooley, and John and Jane
Does 1 through 10. : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

PDQ LUBE CENTER, INC., a)
Utah Corporation,)

Plaintiff/Appellee,)
)

vs.)
)

R. LOWELL HUBER,)
Defendant/Appellant, and)
Third-Party Plaintiff,)

Case No. 950752-CA

vs.)
)

Trial Court No. 94 038

JUNE T. BOWEN, THE ESTATE OF)
DARRELL J. BOWEN, DENNIS)
GREENE, PETE RIGGS, BOB)
RIGGS, REED HOOLEY, TROY)
HOOLEY and JOHN AND JANE)
DOES 1-10,)

Priority No. 15

Third-Party Defendants.

BRIEF OF APPELLEE

Appeal from a Judgment of the
First Judicial District Court
Cache County, Utah
The Honorable Ben H. Hadfield Presiding

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 950752-CA

FILED

Utah Court of Appeals

JUL 7 - 1997

Julia D'Alesandro
Clerk of the Court

PDQ LUBE CENTER, INC., a)
Utah Corporation,)
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Plaintiff/Appellee,)
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vs.)
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Joseph M. Chambers #0612
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31 Federal Avenue
Logan, UT 84321
Attorney for Defendant/Appellee

LIST OF ALL PARTIES IN THE DISTRICT COURT

The following parties and attorneys appeared in the proceeding in the trial court:

1. PDQ Lube Center, Inc., a Utah corporation, Plaintiff/Appellee, represented by Larry E. Jones of Hillyard, Anderson & Olsen.

2. R. Lowell Huber, Defendant/Appellant and Third-Party Plaintiff, represented by Joseph M. Chambers of Preston & Chambers.

3. As to PDQ Lube Center, Inc. and R. Lowell Huber, this is a multiple claim case. A July 3, 1995 Judgment was entered in this case ordering the specific performance of a contract for the purchase of real property between PDQ Lube Center, Inc. as buyer and R. Lowell Huber as seller. The July 3, 1995 judgment is the subject of this appeal and is currently pending before this Court, Case No. 950752-CA.

4. Subsequent to this appeal, R. Lowell Huber removed the underground storage tanks and obtained environmental clearance from the State of Utah. PDQ Lube Center, Inc. obtained the necessary financing and tendered the funds as required. The trial court, however, ruled in its February 15, 1996 Order Terminating Defendant Huber's Obligation to Convey, that the funds were restricted and not available for distribution by the required date, that PDQ Lube Center, Inc. failed to meet its obligations under the July 3, 1995 Judgment, and R. Lowell Huber was relieved of his obligation to convey. The February 15, 1996

Order Terminating Defendant Huber's Obligation to Convey is the subject of a separate appeal pending before this Court, Case No. 960617-CA, and involves issues which are not relevant to this appeal.

5. As to Third-Party Defendants, this is a multiple party and multiple claim case. The multiple party and claim aspects of the case involving the Third-Party Defendants are not before the Court on appeal. The Third-Party Defendants were sued by R. Lowell Huber, Third-Party Plaintiff, relative to the liability of various "owners" and "operators" of the property in question under the Underground Storage Tank Act, Utah Code Ann., Title 19, Chapter 6, and under a Property Sale Contract. The third-party action is still pending in District Court. The claims in the third-party action are not similar to the claims on appeal.

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vs.) **BRIEF OF APPELLEE**
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DOES 1-10,)
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Third-Party Defendants.)

The Utah Supreme Court has original jurisdiction over this matter pursuant to § 78-2-2(3)(j) U.C.A. and Utah R. App. P. Rules 3 and 4. This matter was transferred to the Utah Court of Appeals pursuant to § 78-2-2(4) and § 78-2a-3(2)(j) U.C.A.

1. The issues outlined in the Brief of Appellant are inappropriately framed as the trial court did not find that "seller's obligation to remove the underground tanks (and obtain environmental clearance) was a condition precedent rather than a concurrent condition to the buyer's obligations to obtain financing, to tender the purchase funds, etc." See *Brief of Appellant*, p. 1. Rather, the trial court ordered specific performance of the contract based on its finding that "PDQ Lube

Center made all reasonable efforts to comply in good faith with its obligations under the contract" and that "Lowell Huber failed to make a good faith effort to remove the tanks." The trial court found further that "when Lowell Huber could not obtain contributions from a third party, Lowell Huber engaged in bad faith conduct in an attempt to kill the deal." See *Appellant's Addendum 2, trial court's Findings of Fact and Conclusions of Law*, p. 6-7, para. 3-4. Further, the trial court found that "[a]ny failure of PDQ Lube Center to perform under the contract was directly related to or caused by Lowell Huber's bad faith and failure to perform." *Id.*, p. 7, para. 5.

Standard of Review: Specific performance is an equitable remedy in which the trial court is granted broad discretion in applying and formulating. *LHIW, Inc. v. DeLorean*, 753 P.2d 961 (Utah 1988). Moreover, a trial court's ruling based on its discretion in granting specific performance should not be upset unless it clearly appears that the trial court has abused its discretion. *Morris v. Sykes*, 624 P.2d 961 (Utah 1981).

APPLICABLE STATUTE

Utah Code Ann. § 42-2-10:

Any person who carries on, conducts, or transacts business under an assumed name without having complied with the provisions of this chapter, and until the provisions of this chapter are complied with:

- (1) shall not sue, prosecute, or maintain any action, suit, counterclaim, cross complaint, or proceeding in any of the courts of this state; and
- (2) may be subject to a penalty in the form of a late filing fee determined by the

division director in an amount not to exceed three times the fees charged under Section 42-2-7 and established under Subsection 63-38-3(2).

STATEMENT OF THE CASE

A. Nature of the Case. The Defendant R. Lowell Huber (hereinafter "R. Lowell Huber") appealed from the July 3, 1995 trial court Judgment which granted specific performance of the real estate contract and awarded attorney fees against him. As previously stated, the trial court did not interpret Huber's "obligation under [the] contract to be a condition precedent rather than a condition concurrent to the buyer's obligation to obtain financing and tender of the purchase price and a \$4,000 non-refundable deposit" as claimed by R. Lowell Huber in his Statement of the Case. *See Brief of Appellant, p. 6.* Rather, the trial court ordered specific performance of the contract based on its finding that "PDQ Lube Center made all reasonable efforts to comply in good faith with its obligations under the contract," that "Lowell Huber failed to make a good faith effort to remove the tanks," and that "when Lowell Huber could not obtain contributions from a third party, Lowell Huber engaged in bad faith conduct in an attempt to kill the deal." *See Appellant's Addendum 2, Trial Court's Findings of Fact and Conclusions of Law, p. 6-7, para. 3-4.* Further, the trial court found that "[a]ny failure of PDQ Lube Center to perform under the contract was directly related to or caused by Lowell Huber's bad faith and failure to perform." *Id., p. 7, para. 5.*

B. Course of Proceedings and Disposition. PDQ Lube Center, Inc. essentially agrees with the "Course of Proceedings and Disposition in the Court Below" as outlined in the Brief of Appellant in numbered paragraphs 1 through 7. However, numbered paragraphs 8 through 20, though involving the same parties, is the subject of a separate appeal pending before this Court, Case No. 960617-CA, and involves issues which are not relevant to this appeal. PDQ Lube Center, Inc. has filed its Brief of Appellant in that case fully addressing the issues raised on that appeal.

C. Statement of Facts. PDQ Lube Center, Inc. agrees with R. Lowell Huber that the trial court's July 3, 1995 Findings of Fact and Conclusions of Law Appellant, appropriately summarize the relevant facts of the case for purposes of this appeal. However, R. Lowell Huber's supplemental comments, as italicized in the Brief of Appellant, contain several misstatements and arguments presented by R. Lowell Huber and rejected by the trial court at trial.

Because the Statement of Facts is central to the case, and R. Lowell Huber's Statement of Facts was somewhat confusing as presented, PDQ Lube Center, Inc. sets forth the following Statement of Facts. Thereafter, PDQ Lube Center, Inc. addresses the italicized supplemental statements of R. Lowell Huber.

1. PDQ Lube Center, Inc.'s Statement of Facts.

a. On September 17, 1993, PDQ Lube Center Inc. tendered to R. Lowell Huber a Real Estate Purchase Contract and Addendum offering to purchase property located at North Main

Street in Logan, Utah. On September 20, 1993, R. Lowell Huber accepted PDQ Lube Center, Inc.'s offer. R. at 6-9.

b. On March 14, 1994, PDQ Lube Center, Inc. filed its Complaint seeking R. Lowell Huber's specific performance of his obligations under the Real Estate Purchase Contract and Addendum. R. at 1-9.

c. After four days of trial held on February 8, 9, 10, and 16, 1995, the trial court held in favor of PDQ Lube Center, Inc. and made Findings of Fact. The Findings of Fact (and the Conclusions of Law and Judgment) are extensively quoted because they effectively set forth the facts of the case giving rise to the ruling now on appeal. (A complete copy of the Findings of Fact is included in the Addendum of the Brief of Appellant.)

4. Within a week of when the parties entered into the Real Estate Purchase Contract and Addendum, PDQ Lube Center sought new financing by meeting with the Certified Development Company in Salt Lake City with regards to an SBA loan and was given a checklist of items to complete including the fact that they would need to contact an SBA loan sponsor, and consequently met with Joel Rush, a banker with the Bank of Utah. PDQ Lube Center met with Logan City representatives relative to building site and construction permits (a building permit was not formally approved). PDQ Lube Center obtained site approval from Pennzoil Products. During that same time frame and supplemented over four weeks, PDQ Lube Center provided the Bank of Utah with a folder on the property, received by the Court as Exhibit "2", which included information about the demographics, the Pennzoil products and equipment, the building plan, ten-year projections, a three-year track record, balance sheet, tax returns of PDQ Lube Center in Ogden, Craig Hansen's 1993 personal financial statement, comparables on the property, and a bid for construction on the building.

5. No appraisal of the property was ever obtained by PDQ Lube Center or the bank working with PDQ Lube Center to obtain the SBA loan. Though there was

evidence that a loan could have been performed prior to removal of the tanks and proof of no contamination, there was also evidence that until the tanks were removed and proof of no contamination shown, an appraisal would have had little value.

6. On September 22, 1993, Lowell Huber had permits to remove the underground tanks from the property. He had obtained a bid from Whitaker Construction Company a year prior for removal of the tanks. He was licensed as a tank remover and was doing business as Cache Valley Tank Removers and Soil Samplers and had previously removed a tank in a land sale in which Martin Spicer, the real estate agent in this case, was involved. At the time the contract was created, the parties all were aware that Lowell Huber had an issued permit for removal of the tanks. The parties understood and believed that the tanks would be removed during the time frame authorized by that permit. Martin Spicer testified and the Court believes that Lowell Huber said he would move immediately upon signing of the contract to remove the tanks. He had a site permit. He was a licensed remover. He had his own backhoe and could expedite removal very quickly. Because of the weather and other things, he represented he could proceed within perhaps a 30-day time frame from the date the parties entered into the Real Estate Purchase Contract and Addendum.

7. Martin Spicer had numerous discussions with Lowell Huber as to why the tanks were not removed. Lowell Huber wanted to negotiate with Bowens for their participation in the removal costs. (Bowens were predecessors in interest in the property at issue in this case.) When the Bowens refused to participate in the removal costs, Huber said he wanted to kill the deal.

8. The Real Estate Purchase Contract and Addendum provided that PDQ Lube Center provide a \$4,000.00 non-refundable cleanup deposit. On November 12, 1993, PDQ Lube Center sent the \$4,000.00 deposit to Martin Spicer upon the request of Mr. Spicer.

9. On or about the 15th of November, 1993, Martin Spicer met with Lowell Huber and showed him the \$4,000.00 PDQ Lube Center deposit and discussed with Huber not only the deposit but also the unwillingness of the Bowens to participate in the costs of removal.

10. On or about November 15, 1993, and at later times, Martin Spicer offered to advance funds to Lowell

Huber in order that Lowell Huber would have sufficient funds to remove the tanks.

12. Lowell Huber has yet to provide PDQ Lube Center with a State of Utah Bear River Health Department Environmental Clearance and remove any unacceptable contamination at Huber's expense.

13. Lowell Huber has at no time objected to PDQ Lube Center's attempts to obtain a loan under the terms of the Real Estate Purchase Contract and Addendum. Under the Real Estate Purchase Contract and Addendum, PDQ Lube Center is deemed qualified.

14. PDQ Lube Center's attorney's fees and costs incurred through February 9, 1995 total \$9,187.50. Said fees and costs are reasonable, consistent with those generally charged in this community both as to hourly charge and time spent, and are reasonably reflective of attorney fees and costs incurred in this kind of case and in light of the result reached in this case.

15. Though PDQ Lube Center was involuntarily suspended effective April 16, 1993 for failure to file its annual report, PDQ Lube Center was reinstated on January 17, 1995 under the name of PDQ Lube Service Center, Inc.

16. Pursuant to Rule 54(b), Utah Rules of Civil Procedure, the Court finds that there is not just reason for delay in entering judgment on PDQ Lube Center's claims against Lowell Huber.

R. at 595-604.

d. Based on the foregoing Findings of Fact, the trial court entered the following Conclusions of Law (a complete copy of the Conclusions of Law is included in the Addendum of the Brief of Appellant):

1. PDQ Lube Center and Lowell Huber entered into a valid contract for the sale of the subject property.

2. The contract provided that time was of the essence.

3. PDQ Lube Center made all reasonable efforts to comply in good faith with its obligations under the

contract, including its providing the \$4,000.00 nonrefundable cleanup deposit.

4. Lowell Huber failed to make a good faith effort to remove the tanks. On the contrary, when Lowell Huber could not obtain contributions from a third party, Lowell Huber engaged in bad faith conduct in an attempt to kill the deal.

5. Any failure of PDQ Lube Center to perform under the contract was directly related to or caused by Lowell Huber's bad faith and failure to perform.

6. PDQ Lube Center should be awarded an order of specific performance from this Court directing Lowell Huber to comply with the contract by:

(a) providing PDQ Lube Center with a state and local environment clearance certificate for the site; and

(b) both parties are ordered to comply with the contract terms.

7. An order should be entered requiring Lowell Huber to convey the property to PDQ Lube Center if PDQ Lube Center is able to tender the full purchase price within 84 days following the proof to PDQ Lube Center of environmental clearance for the site. The original contract was 84 days from signing until closing. The time frame now may be longer because Lowell Huber will now have to obtain a new removal permit and the Court doesn't have any information on how long that will take. Originally, there was an existing permit. That permit has expired. Consequently, the Court is selecting that 84-day figure or term and saying that will commence on the date the certificate is provided showing that the site is environmentally clean.

8. Pursuant to paragraph 17 of the Real Estate Purchase Contract and Addendum, PDQ Lube Center is entitled to an award of attorney's fees and costs of \$9,187.50, plus additional attorney fees and costs which may be shown by affidavit, Lowell Huber to have the right to review and object to the additional attorney fees and costs.

11. Having found that there is not just reason for delaying entry of judgment on PDQ Lube Center's claims against Lowell Huber, the Court hereby directs that judgment be entered on these claims as a final

judgment pursuant to Rule 54(b), Utah Rules of Civil Procedure.

R. at 595-604.

e. Having entered its Findings of Fact and Conclusions of Law, the trial court entered its Judgment (a complete copy of the Judgment is included in the Addendum of the Brief of Appellee):

1. That PDQ Lube Center be and is hereby awarded an order of specific performance from this Court directing Lowell Huber to comply with the contract by (a) providing PDQ Lube Center with a state and local environment clearance certificate for the site; and (b) both parties are ordered to comply with the contract terms.

2. Lowell Huber is required to convey the property to PDQ Lube Center if PDQ Lube Center is able to tender the full purchase price within 84 days following the proof to PDQ Lube Center of environmental clearance for the site.

3. PDQ Lube Center is awarded attorney's fees and costs of \$9,187.50, plus additional attorney fees and costs which may be shown by affidavit, Lowell Huber to have the right to review and object to the additional attorney fees and costs.

6. Pursuant to Rule 54(b), Utah Rules of Civil Procedure, this Judgment is a final judgment as to PDQ Lube Center's claims against Lowell Huber.

R. at 607-610.

f. On August 1, 1995, R. Lowell Huber appealed the trial court's July 3, 1995 Judgment. R. at 618-619.

2. Response to italicized supplemental statements of R. Lowell Huber.

a. Italicized Statement to numbered paragraphs 1 and 11 of R. Lowell Huber's "Statement of Facts". R. Lowell Huber misstated that "the offer to purchase was made through a licensed

real estate agent Marty Spicer who failed to disclose to Huber he was acting as both the seller and the buyer's agent", and that Martin Spicer's handling of the \$4,000 tank removal deposit was "legally improper". In fact, the Real Estate Purchase Contract signed by PDQ Lube Center, Inc. and R. Lowell Huber, specifically stated in its numbered paragraph 5 as follows:

CONFIRMATION OF AGENCY DISCLOSURE. At the signing of this Contract the listing agent MARTIN SPICER represents X Seller ___ Buyer, and the selling agent MARTIN SPICER represents ___ Seller X Buyer. Buyer and Seller confirm that prior to signing this Contract written disclosure of the agency relationship(s) was provided to him/her. () Buyer's Initials () Seller's Initials.

See copy of Real Estate Purchase Contract included in the Addendum of Brief of Appellant.

The foregoing clearly discloses Martin Spicer represented both parties. Admittedly, not checked on the foregoing was the box stating that written disclosure was provided.

In addition, Martin Spicer testified at trial in response to questions from PDQ Lube Center, Inc.'s attorney, Larry Jones, that he disclosed to R. Lowell Huber that he was acting as agent for both PDQ Lube Center, Inc. and R. Lowell Huber.

Q. Let's go back to when this transaction was occurring. You indicated your recollection was September 17th, 1993. PDQ was in your office, vis-a-vis Craig Hansen and Marty Collins, correct?

A. That's correct.

Q. Was Lowell Huber also in your office?

A. He did come to my office later that evening to review the first offer and to write up a counteroffer.

Q. Okay.

A. Write up the counteroffer.

Q. By virtue of your listing agreement with Lowell Huber, which is Plaintiff's Exhibit No. 5, you were clearly Lowell Huber's agent, were you not?

A. That is correct.

Q. Did you at any point during the transaction prior to the signing of the documents, represent that to PDQ?

A. I did.

Q. Okay. With respect to Lowell Huber, when he came in did you represent to Lowell Huber that you were also representing PDQ?

A. I did.

Q. And that was prior to the signing of the documents?

A. That is correct.

Trial Transcript page 166, lines 17-25, and page 167, lines 1-17. Marty Spicer represented both R. Lowell Huber and PDQ Lube Center, Inc., including his holding of the \$4,000.00 tank removal deposit.

b. Italicized statement to numbered paragraph 4 of R. Lowell Huber's "Statement of Facts". R. Lowell Huber stated no "formal loan application" was made by PDQ Lube Center, Inc. The trial court found in its Findings of Fact paragraphs 4 and 13 that PDQ Lube Center, Inc. sought new financing within a week of when the parties entered into the Real Estate Purchase Contract, and that R. Lowell Huber at no time objected to PDQ Lube Center, Inc.'s attempts to obtain a loan, and, therefore, PDQ Lube Center, Inc. was deemed qualified under the Real Estate Purchase Contract.

c. *Italicized Statement to numbered paragraphs 6, 7, and 13 of R. Lowell Huber's "Statement of Facts".* R. Lowell Huber stated that there was no written or oral representation that R. Lowell Huber would remove the tanks "within 30 days" and "before financing was assured", that no one told R. Lowell Huber that the tanks had to be removed so that an appraisal could be done, and that no one objected to his waiting until the financing was in place before he removed the tanks. Huber was the one who represented that "he could proceed within perhaps a 30-day time frame from the date the parties entered into the Real Estate Purchase Contract and Addendum." Findings of Fact, numbered paragraph 6. Martin Spicer testified that R. Lowell Huber fully intended to remove the tanks until he couldn't obtain a contribution from the previous owners of the property, which had nothing to do with PDQ Lube Center, Inc.'s financing. See Trial Transcript, pages 176-190.

d. *Italicized statement to numbered paragraph 16 of R. Lowell Huber's "Statement of Facts".* R. Lowell Huber's attorney, Joseph M. Chambers, requested the Rule 54(b), Utah Rules of Civil Procedure, certification by the trial court.

SUMMARY OF ARGUMENTS

1. The trial court did not interpret the Real Estate Purchase Contract to contain a condition precedent obligating R. Lowell Huber to remove underground storage tanks prior to PDQ Lube Center, Inc.'s (hereinafter "PDQ") tender of the purchase funds. The trial court found that R. Lowell Huber had acted in

bad faith in an attempt to "kill the deal" and that any failure in PDQ Lube Center, Inc.'s performance was because of R. Lowell Huber's bad faith. It was not error for the trial court to grant specific performance of the contract.

2. The trial court did not commit error by allowing parole evidence over Huber's continuing objection and Motion in Limine.

3. The trial court did not commit error when it allowed PDQ to maintain the action after being reinstated by complying with Utah Code Ann. § 42-2-10.

4. PDQ Lube Center, Inc. should be awarded its attorney fees and costs on appeal.

ARGUMENT

I

THE TRIAL COURT DID NOT INTERPRET THE REAL ESTATE PURCHASE CONTRACT TO CONTAIN CONDITIONS PRECEDENT, RATHER IT GRANTED SPECIFIC PERFORMANCE BASED ON PDQ LUBE CENTER, INC.'S GOOD FAITH EFFORT TO COMPLY WITH THE CONTRACT TERMS AND R. LOWELL HUBER'S BAD FAITH ATTEMPT TO "KILL THE DEAL".

R. Lowell Huber erroneously contends that the trial court found that the "seller's obligation to remove the underground tanks (and obtain environmental clearance) was a condition precedent rather than a concurrent condition to the buyer's obligations to obtain financing, to tender the purchase funds, etc." *See Brief of Appellant, p. 1, para. 1.*

In actuality, the trial court ordered specific performance of the contract based on its finding that "PDQ Lube Center made all reasonable efforts to comply in good faith with its obligations under the contract" and that "Lowell Huber failed to

make a good faith effort to remove the tanks. On the contrary, when Lowell Huber could not obtain contributions from a third party, Lowell Huber engaged in bad faith conduct in an attempt to kill the deal." *See Appellant's Addendum 2, Trial Court's Findings of Fact and Conclusions of Law, p. 6-7, para. 3-4.*

Moreover, the trial court found that "[a]ny failure of PDQ Lube Center to perform under the contract was directly related to or caused by Lowell Huber's bad faith and failure to perform." *Id., p. 7, para. 5.*

Specific performance is an equitable remedy which is available to an aggrieved party when the party's remedy at law is inadequate and consists of a requirement that the party guilty of a breach of contract undertake to perform or complete the performance of its obligations under the contract. *Barron's Law Dictionary*, 458-59 (3d ed. 1991).

Each party to a contract has the duty to cooperate with the other in good faith for its performance. Tanner v. Baadsgaard, 612 P.2d 345, 347 (Utah 1980). Moreover, whether or not expressed, every contract includes a covenant of good faith with respect to the dealings between the parties and each must deal fairly and honestly with the other. Rio Algom Corp. v. Jimco Ltd., 618 P.2d 497, 505 (Utah 1980).

Pursuant to extensive presentation of evidence, testimony, and argument at trial held on February 8, 9, 10, and 16, 1995, the trial court found on September 22, 1993, that R. Lowell Huber had permits to remove the tanks from the property, was licensed

to remove such tanks, had the equipment necessary for removal, had represented that he could proceed with the removal within thirty (30) days of entering into the Real Estate Purchase Agreement and Addendum, yet failed to do so because of the unwillingness of a third party to contribute to the removal. See *Appellant's Addendum 2, Trial Court's Findings of Fact and Conclusions of Law*, p. 3-4, para. 6.

Based on the testimony of Martin Spicer at trial, the trial court found that "[w]hen the Bowens refused to participate in the removal costs, Huber said he wanted to kill the deal." *Id.*, p. 4, para. 7; *Transcript of Videotaped Trial, February 8, 1995*, p. 182, *Appellee's Addendum 1*. The trial court concluded as a matter of law that "Lowell Huber failed to make a good faith effort to remove the tanks . . ." and "engaged in bad faith conduct to kill the deal." *Id.*, p. 6-7, para. 3-4. R. Lowell Huber's bad faith actions were a breach of contract and the implied covenant of good faith and fair dealing that exists in every contract. Brehany v. Nordstrom, Inc., 812 P.2d 49 (Utah 1992).

R. Lowell Huber further contends that PDQ never tendered a performance as required by the Real Estate Purchase Contract. See *Brief of Appellant*, p. 29-30. R. Lowell Huber argues that PDQ Lube Center, Inc.'s failure to obtain an appraisal and submit a formal loan application was a failure to tender a required performance under the contract.

The trial court found, however, that R. Lowell Huber failed to object to PDQ Lube Center, Inc.'s attempt to qualify for financing as required by Paragraph 2.2 of the Real Estate Purchase Contract, and that pursuant to Paragraph 2.3 "PDQ is deemed qualified." See *Appellant's Addendum 2, Trial Court's Findings of Fact and Conclusions of Law*, p. 5, para. 13; see also *Appellant's Addendum 1, Real Estate Purchase Contract*, p. 1, para. 2.2-2.3. Again, the trial court found that "[a]ny failure of PDQ Lube Center to perform under the contract was directly related to or caused by Lowell Huber's bad faith and failure to perform." *Id.*, p. 7, para. 5.

The order of specific performance of the Real Estate Purchase Contract granted by the trial court was an appropriate and equitable response to Defendant Huber's bad faith actions and failure to perform. The trial court's ruling, based on its broad discretion in granting specific performance, should not be upset unless it clearly appears that the trial court has abused its discretion. See Morris v. Sykes, 624 P.2d 961 (Utah 1981).

II

THE TRIAL COURT DID NOT COMMIT ERROR IN ALLOWING PAROLE EVIDENCE OVER R. LOWELL HUBER'S OBJECTION AND MOTION IN LIMINE.

R. Lowell Huber claims that the trial court committed error "in failing to grant Defendant's Motion in Limine when it allowed parole evidence over the Defendant's continuing objection." See *Brief of Appellant*, p. 4, para. 4. R. Lowell Huber, however, fails to outline the basis of this contention in his Brief. R.

Lowell Huber correctly states that regarding the admissibility of evidence under Rule 403, a trial court's ruling will not be overturned unless it was an abuse of discretion. *Id.*; State v. Lindgreen, 910 P.2d 1271 (Utah App. 1996) (quoting State v. White, 880 P.2d 18, 20 (Utah App. 1994)). Without knowing the basis of R. Lowell Huber's contention, PDQ Lube Center, Inc. respectfully submits that the trial court did not abuse its discretion by allowing the evidence.

III

**THE TRIAL COURT DID NOT COMMIT ERROR WHEN IT ALLOWED
PDQ LUBE CENTER, INC. TO MAINTAIN THE ACTION AFTER
BEING REINSTATED BY COMPLYING WITH UTAH CODE ANN. § 42-
2-10.**

R. Lowell Huber contends that because PDQ Lube Center, Inc. was involuntarily suspended effective April 16, 1993, for failure to file an annual report, and was subsequently reinstated on January 17, 1995, with the name PDQ Lube Service Center, Inc. instead of PDQ Lube Center, Inc., that Utah Code Ann. § 42-2-10 was violated. *See Brief of Appellant*, p. 34.

R. Lowell Huber made this argument in its Motion to Dismiss and Memorandum of Points and Authority in Support of Defendant's Motion to Dismiss. *Trial Record (TR)*, p. 291-96, *Appellee's Addendum 3*. PDQ Lube Center, Inc. responded by filing the Plaintiff's Memorandum and Points and Authorities in Opposition of Defendant's Motion to Dismiss Complaint and attached a copy of the Reinstatement. *TR*, p. 336-42, *Appellee's Addendum 4*.

In its February 7, 1995 Memorandum Decision, the trial court correctly ruled on the issue as follows:

There is no question that the Plaintiff was involuntarily dissolved or suspended as a corporation by the State of Utah approximately April 1, 1993. There likewise appears no question that the State of Utah has approved Plaintiff's Application for Reinstatement, such approval effective January 17, 1995. Defendant argues that because a single word in the title of Plaintiff's filing was changed, this is not a reinstatement. In this case, the Court defers to the decision of the Utah Division of Corporations, which has clearly determined that Plaintiff receive a reinstatement. Defendant's Motion to Dismiss is denied.

TR, p. 366-67, Appellee's Addendum 5.

The only reason that PDQ Lube Center, Inc.'s reinstatement was issued under the name "PDQ Lube Service Center, Inc." was that another entity filed for the name "PDQ Lube Center" during the period of involuntary suspension. *TR, p. 337, Appellee's Addendum 4.* Upon PDQ Lube Center, Inc.'s reinstatement and compliance with Utah Code Ann., Title 42, Chapter 2, the application of penalties under Utah Code Ann. § 42-2-10 became irrelevant. The trial court correctly ruled against R. Lowell Huber on this issue.

IV

PDQ LUBE CENTER, INC. SHOULD BE AWARDED IRTS ATTORNEY FREES AND COSTS ON APPEAL.

The Real Estate Purchase Contract paragraph 17 provides that "In any action arising out of this Contract, the prevailing party shall be entitled to costs and reasonable attorney's fees."

PDQ Lube Center, Inc. was awarded attorney fees and costs by the trial court and there is even now an outstanding motion

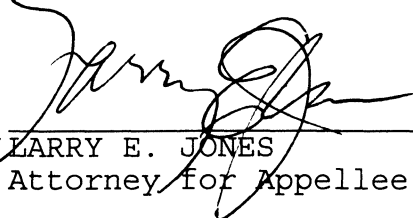
before the trial court to supplement those attorney fees and costs for past trial expenses.

CONCLUSION

For the reasons outlined above, the trial court properly granted specific performance of the contract. Moreover, the trial court did not rewrite the contract or interpret it to contain a condition precedent. The trial court properly allowed evidence to be submitted based on its discretion and ruled that PDQ Lube Center, Inc.'s reinstatement avoided the penalties outlined in Utah Code Ann. § 42-2-10. The trial court's decision should be affirmed and PDQ Lube Center, Inc. awarded its attorney fees and costs on appeal.

Dated this 7th day of July, 1997.

HILLYARD, ANDERSON & OLSEN



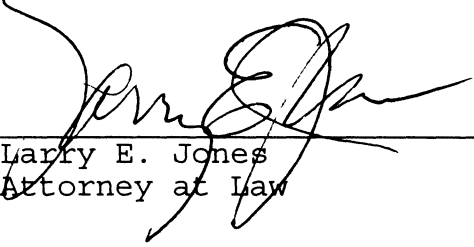
LARRY E. JONES
Attorney for Appellee

(original signature)

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing BRIEF OF APPELLEE were mailed, postpaid, to the following this 7th day of July, 1997:

Joseph M. Chambers
Attorney for Defendant
31 Federal Avenue
Logan, UT 84321



Larry E. Jones
Attorney at Law

(original signature)

ADDENDUM

1. July 3, 1995 Judgment.
2. Deposition of Martin Spicer, page 182
3. R. Lowell Huber's Motion to Dismiss Complaint dated December 20, 1994.
4. Plaintiff's Memorandum of Points and Authorities in Opposition of Defendant's Motion to Dismiss Complaint dated January 20, 1995.
5. Memorandum Decision dated February 7, 1995.

ADDENDUM 1

HILLYARD, ANDERSON & OLSEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
175 EAST FIRST NORTH
LOGAN, UTAH 84321
TELEPHONE (801) 752-2610

FIRST DISTRICT COURT
CACHE COUNTY

'95 JUN -8 P4:45

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY

STATE OF UTAH

PDQ LUBE CENTER, INC. a
Utah Corporation,

Plaintiff,

vs.

R. LOWELL HUBER,

Defendant and
Third-Party Plaintiff,

vs.

JUNE T. BOWEN, THE ESTATE OF
DARRELL J. BOWEN, DENNIS
GREENE, PETE RIGGS, BOB
RIGGS, REED HOOLEY, TROY
HOOLEY and JOHN AND JANE
DOES 1-10,

Third-Party Defendants.

JUDGMENT

Civil No. 94 038

Judge Ben H. Hadfield

The above-entitled matter came on regularly for trial on February 8, 9, 10, and 16, 1995. The Honorable Ben H. Hadfield presided. Plaintiff PDQ Lube Center, Inc. ("PDQ Lube Center") appeared by and through its president, Craig Hansen, and its attorney, Larry E. Jones of Hillyard, Anderson & Olsen. Defendant R. Lowell Huber ("Lowell Huber") appeared in person and by and through his attorney, Joseph M. Chambers of Preston and Chambers. The Court heard testimony, received exhibits, and heard arguments of counsel. The Court issued its decision from the bench on February 16, 1995. The Court having before it the evidence,

7-13-95
53

94-038
#100
July 5, 1995
11

having heretofore entered its Findings of Fact and Conclusions of Law, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. That PDQ Lube Center be and is hereby awarded an order of specific performance from this Court directing Lowell Huber to comply with the contract by (a) providing PDQ Lube Center with a state and local environment clearance certificate for the site; and (b) both parties are ordered to comply with the contract terms.

2. Lowell Huber is required to convey the property to PDQ Lube Center if PDQ Lube Center is able to tender the full purchase price within 84 days following the proof to PDQ Lube Center of environmental clearance for the site.

3. PDQ Lube Center is awarded attorney's fees and costs of \$9,187.50, plus additional attorney fees and costs which may be shown by affidavit, Lowell Huber to have the right to review and object to the additional attorney fees and costs. *YSHH*

PDQ
4. ~~Lowell Huber~~ is awarded no damages for lost income, there being insufficient evidence for the Court to make an award of damages at this time.

5. If from this point forward the Court were to determine that Lowell Huber is guilty of any future delays in completing his obligations under the contract, the Court at that point will allow PDQ Lube Center to present additional evidence, including market studies, expert

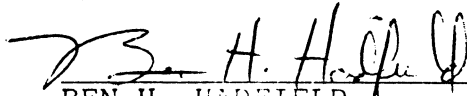
LAW OFFICES, HILLYARD, ANDERSON & OLSEN, 175 EAST FIRST NORTH, LOGAN, UTAH 84321

testimony, and other types of evidence, as to lost income from the date of the trial forward.

6. Pursuant to Rule 54(b), Utah Rules of Civil Procedure, this Judgment is a final judgment as to PDQ Lube Center's claims against Lowell Huber.

Dated this 3 day of July, 1995.

BY THE COURT:


BEN H. HADFIELD
District Court Judge

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing
JUDGMENT was mailed, postage prepaid, on the 7 day of
June, 1995, to the following:

Joseph M. Chambers
Attorney for Defendant
31 Federal Avenue
Logan, UT 84321

L. Brent Hoggan
Attorney for June T. Bowen and
the Estate of Darrell J. Bowen
P. O. Box 525
Logan, UT 84323-0525

Heinz J. Mahler
Kipp & Christian P.C.
Attorney for Pete Riggs and
Bob Riggs
175 East 400 South #330
Salt Lake City, UT 84111-2314

James C. Jenkins
Attorney for Reed Hooley and
Troy Hooley
67 East 100 North
Logan, UT 84321

Carmen S. Brigham
Secretary

g:\data\lej\pdq.jdg

ADDENDUM 2

1 believe he sent me a letter, but I can't recall what
2 he sent.

3 Q. Let me hand you what is marked as Plaintiff's
4 Exhibit No. 15. Is that a copy of the letter sent to
5 you by Mr. Hoggan?

6 A. It is.

7 Q. And what does Mr. Hoggan indicate to you in
8 the letter, generally, as to the Bowen position on
9 removal of the tanks?

10 A. That generally there was no agreement and
11 that she feels no obligation to accept any
12 responsibility for removing the tanks or any
13 remediation. I was asked to pass that information on
14 to Mr. Huber.

15 Q. What was Mr. Huber's response?

16 A. His response was that he wouldn't close the
17 sale unless the Bowens would pay for 50 percent of the
18 removal cost.

19 Q. Did he state anything about PDQ and its
20 performance under the contract?

21 A. Umm, at that point in time, because the fines
22 were levied and he, in addition, said he just wanted
23 to kill the deal. He would do it himself. My
24 position was to keep the transaction together, both
25 buyer and seller. And at that point in time I asked

ADDENDUM 3


Joseph M. Chambers 0612
PRESTON & CHAMBERS
Attorneys for Defendant
31 Federal Avenue
Logan, Utah 84321
Telephone: (801) 752-3551

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

PDQ	*	
	*	MOTION TO DISMISS COMPLAINT
Plaintiff	*	
vs.	*	
	*	
R. LOWELL HUBER	*	
	*	
Defendant & Third Party	*	
Plaintiff	*	
vs.	*	
	*	
JUNE T. BOWEN, THE ESTATE OF	*	
DAROLD J. BOWEN, DENNIS GREENE	*	Civil No. 9400038
PETE RIGGS, BOB RIGGS, REED	*	
HOOLEY, TROY HOOLEY and JOHN	*	Judge Clint S. Judkins
and JANE DOES 1-10	*	
	*	
Third Party Defendants	*	

COMES NOW, the Defendant Lowell Huber and hereby moves this court pursuant to Rule 9(a)(1) U.R.C.P. and §42-2-10 U.C.A. that the Plaintiff lacks the capacity to maintain this action by reason of the fact that it has failed to stay registered with the Utah Department of Commerce Division of Corporations and Commercial Code and as a result thereof is prohibited under Section 42-2-10 U.C.A. from maintaining this action.

Respectfully submitted this 20th day of December, 1994.


JOSEPH M. CHAMBERS

FILED 94-038
DEC 20 1994
BY SL

MAILING CERTIFICATE

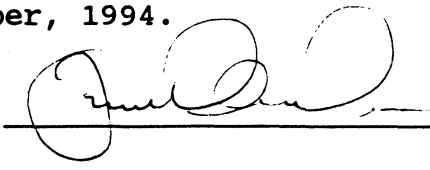
I hereby certify that I mailed a true and correct copy of the
above and foregoing MOTION TO DISMISS COMPLAINT postage prepaid to:

Larry Jones
HILLYARD, ANDERSON & OLSEN
Attorney for PDQ
175 East 100 North
Logan, UT 84321

L. Brent Hoggan
OLSON & HOGGAN
Attorney for June T. Bowen and
the estate of Darold J. Bowen
88 West Center
P.O. Box 525
Logan, UT 84323-0525

dated this 20th day of December, 1994.

d:\v\huber\dismiss

A handwritten signature in dark ink, appearing to read "L. Brent Hoggan", is written over a horizontal line.

Joseph M. Chambers 0612
PRESTON & CHAMBERS
Attorneys for Defendant
31 Federal Avenue
Logan, Utah 84321
Telephone: (801) 752-3551

IN THE FIRST JUDICIAL DISTRICT COURT, COUNTY OF CACHE
STATE OF UTAH

PDQ	*	
	*	
Plaintiff	*	MEMORANDUM OF POINTS AND
vs.	*	AUTHORITY IN SUPPORT OF
	*	DEFENDANT'S MOTION TO DISMISS
	*	
R. LOWELL HUBER	*	
	*	
Defendant & Third Party	*	
Plaintiff	*	
vs.	*	
	*	
JUNE T. BOWEN, THE ESTATE OF	*	
DAROLD J. BOWEN, DENNIS GREENE	*	Civil No. 9400038
PETE RIGGS, BOB RIGGS, REED	*	
HOOLEY, TROY HOOLEY and JOHN	*	Judge Clint S. Judkins
and JANE DOES 1-10	*	
	*	
Third Party Defendants	*	

NATURE OF THE CONTROVERSY

This is a dispute over certain real estate between the Plaintiff as a buyer and the Defendant as a seller under the terms of a certain Earnest Money Agreement executed on September 22, 1993, which for various reasons was not consummated. The Plaintiff (buyer) has brought an action for specific performance attempting to enforce the contract.

NATURE OF MOTION

The present motions raises as an affirmative defense, the incapacity or lack of capacity of the Plaintiff to maintain this action.

FILED 74-038
DEC 20 1994
BY 2.00

DISCUSSION

Section 42-2-5 Utah Code Annotated, 1953 as amended 1990 requires that every person that carries on or conducts or transacts business in this state under an assumed name (whether that business is carried on as an individual, association, partnership, corporation or otherwise) shall file with the Division of Corporations and Commercial Code a certificate setting forth the name in which the business is or to be carried on, as well as the location of the business and a certificate executed by the person who agrees to act as the registered agent with the Division of Corporation and Commercial Code.

Section 42-2-10 prohibits any person who carries on or conducts or transacts business under an assumed name without first having complied with the provisions of Chapter 2, Title 42 U.C.A. from "suing, prosecuting, or maintaining any action, suit, counterclaim, cross-complaint, or proceeding in any of the courts in this state".

FACTS

Accompanying this Memorandum is the Affidavit of Joseph M. Chambers. According to research conducted at the Utah Department of Commerce Division of Corporations and Commercial Codes as recently as December 16, 1994, at approximately 9:37 a.m. a search was made as to the Plaintiff's legal status in the State of Utah. The search disclosed that PDQ Lube Center, Inc., was involuntarily dissolved on April 1, 1993. The legal effect of this is clear: pursuant to Section 16-6-99.1 if a corporation is involuntary suspended the corporate status is allowed to be reinstated for a

period of one year therefore after April 1, 1994, the corporation cannot be revived. (See Section 16-6-99.1 U.C.A.)

Consequently, as a result there is no corporation which legally exists in the State of Utah authorized to use the name PDQ Lube Center, Inc., therefore Plaintiff lacks capacity to maintain this suit as a corporation or otherwise, i.e., if they are not a corporation then they are attempting to do business under an assumed name.

Furthermore, there is no filing by any person as to PDQ Lube Center either as a corporation or a non-corporation. Consequently, the Plaintiff is prohibited from maintaining this action. (See Blodgett v. Zions First National Bank, 752 P.2d 904 (Utah App. 1988)). In Blodgett the Court of Appeals stated the following:

"We acknowledge that Utah Code Annotated Sections 42-2-10 (1981) mandates that any persons who conduct business under an assumed name cannot sue, prosecute, or maintain any action in any of the courts [of this state] unless they comply with the name registration statutes."

In accord Wall Investment Co. v. Garden Gate Distributing, 593 P.2d 542 (Utah 1979) (see text surrounding footnote 11); Sterling Press v. Pettite, 580 P.2d 599 (Utah 1978).

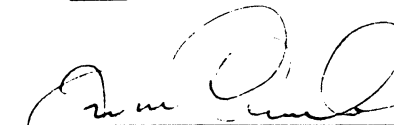
Section 16-6-99.1(4) states the legal effect of the dissolution as follows:

"If the corporation does not remove the suspension within a 120 days after the date of mailing the notice of suspension, the corporation shall be dissolved. The division shall mail a certificate of dissolution to the corporation. A dissolved corporation may not be revived under this chapter or Section 59-7-536, except as provided in subsection 5. The dissolution of any corporation precludes that corporation from doing business in its corporate character under any name or assumed names filed on behalf of the dissolved corporation under Section 42-2-5. On the date of dissolution, the corporation's right in any assumed names it may use is suspended. The name of the dissolved

corporation in any assumed names filed on its behalf are not available for one year from the date of dissolution for use by any other domestic corporation, foreign corporation transacting business in this state, or person doing business under an assumed named under Section 42-2-5."

For the foregoing reasons the Defendant would respectfully request this court to enforce the provisions of Section 42-2-10 and dismiss the suit accordingly.

Respectfully submitted this 20th day of December, 1994.



JOSEPH M. CHAMBERS

MAILING CERTIFICATE

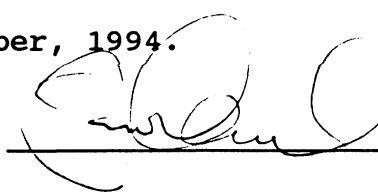
I hereby certify that I mailed a true and correct copy of the above and foregoing MEMORANDUM OF POINTS AND AUTHORITY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS postage prepaid to:

Larry Jones
HILLYARD, ANDERSON & OLSEN
Attorney for PDQ
175 East 100 North
Logan, UT 84321

L. Brent Hoggan
OLSON & HOGGAN
Attorney for June T. Bowen and
the estate of Darold J. Bowen
88 West Center
P.O. Box 525
Logan, UT 84323-0525

dated this 20th day of December, 1994.

d:\vt\huber.2\memorandum



ADDENDUM 4

HILLYARD, ANDERSON & OLSEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
175 EAST FIRST NORTH
LOGAN, UTAH 84321
TELEPHONE (801) 752-2610

LOGAN DISTRICT COURT
Jan 20 4 40 PM '95

IN THE FIRST JUDICIAL DISTRICT COURT OF CACHE COUNTY
STATE OF UTAH

PDQ LUBE CENTER, INC. a)	
Utah Corporation,)	PLAINTIFF'S MEMORANDUM OF
)	POINTS AND AUTHORITIES IN
Plaintiff,)	OPPOSITION OF DEFENDANT'S
)	MOTION TO DISMISS COMPLAINT
vs.)	
)	
R. LOWELL HUBER,)	
)	
Defendant and)	
Third-Party Plaintiff,)	
vs.)	
)	
JUNE T. BOWEN, THE ESTATE OF)	
DARRELL J. BOWEN, DENNIS)	Civil No. 94 038
GREENE, PETE RIGGS, BOB)	
RIGGS, REED HOOLEY, TROY)	Judge Ben H. Hadfield
HOOLEY and JOHN AND JANE)	
DOES 1-10,)	
)	
Third-Party Defendants.)	

COMES NOW Plaintiff PDQ Lube Center, Inc. ("PDQ Lube Center"), by and through its attorney, Larry E. Jones of Hillyard, Anderson & Olsen, and opposes Defendant R. Lowell Huber's ("Lowell Huber") Motion to Dismiss Complaint as follows:

LOWELL HUBER'S MOTION TO DISMISS COMPLAINT

Lowell Huber seeks dismissal of PDQ Lube Center's complaint on the basis that PDQ Lube Center was a suspended corporation on the records of the Division of Corporations and Commercial Code and had not otherwise registered with

94-038
#67
Jan 20, 1995
d.1

the Division of Corporations and Commercial Code to conduct business under an assumed name.

PDQ LUBE CENTER'S REINSTATEMENT

PDQ Lube Center was reinstated by the Division of Corporations and Commercial Code on January 17, 1995. See Application for Reinstatement attached hereto as Exhibit "A" and by this reference incorporated herein.

Because someone else recently filed for the name "PDQ Lube Center", PDQ Lube Center's reinstatement was issued in the "New Corporation Name" of "PDQ Lube Service Center, Inc."

APPLICABILITY OF ASSUMED NAME STATUTE IN LIGHT OF REINSTATEMENT

The assumed name statute does not apply to a corporation which is doing business under its true corporate name. Utah Code Annotated Section 42-2-9 provides in its relevant part as follows:

- (1) This chapter does not affect or apply to any corporation organized under the laws of any state if it does business under its true corporate name.

ARGUMENT

PDQ LUBE CENTER'S REINSTATEMENT RENDERED LOWELL HUBER'S MOTION MOOT

At the time Lowell Huber filed his Motion to Dismiss Complaint, PDQ Lube Center had been suspended by the Division of Corporations and Commercial Code. PDQ Lube Center was reinstated on January 17, 1995.

In Blodgett v. Zions First Nat. Bank, 752 P.2d 901 (Utah App. 1988), the case cited by Lowell Huber in support

of his motion, the Court of Appeals considered a fact situation where a plaintiff, which had not complied with the assumed name statute, had assigned its claims to two individuals. The Court of Appeals ruled that the assignment of the claim rendered the failure to comply with the assumed name statute moot. 752 P.2d 905-6. The Court of Appeals' unwillingness to dismiss a complaint based on an assumed name statute violation is wholly consistent with earlier case law.

In Wall Invest. Co. v. Garden Gate Distributing, 593 P.2d 542 (Utah 1979), a case cited in Blodgett, supra, the defendant sought dismissal of the plaintiff's complaint on the basis that the plaintiff had failed to file an assumed name certificate. At a point unclear from the case, the plaintiff filed for its assumed name certification. Denying the defendant's claim for dismissal, the Supreme Court ruled:

Wallco's early failure to comply with the assumed name statute does not disqualify it as a plaintiff in this suit. The only sanction associated with non-compliance is denial of the non-complying entity's access to the courts, and that sanction is removed on compliance. (Platt v. Locke, 11 Utah 2d 273, 358 P.2d 95 (1961)).

As in Wall, supra, PDQ Lube Center's denial of access to the court was removed by its reinstatement.

The Platt case footnoted in the Wall quote is also instructive in this case as it gives the underlying rationale for the assumed name statute. The Utah Supreme Court wrote in Platt, 358 P.2d 98:

Platt's failure to file in the Salt Lake County Clerk's Office an affidavit that he was conducting his business under the assumed name of Crystal Pools, Inc., does not bar his recovery. Apparently this court has never directly passed on this question. However, the law on this subject is correctly stated in Oakason v. Lisbon Valley Uranium Company, syllabus 1. That

"[N]oncompliance with Utah assumed name statute would not preclude recovery by plaintiff otherwise entitled to recovery for services rendered under a contract, since such statute is primarily for the convenience of the public rather than protection of the public." It is generally recognized that the legislature in passing such statute did not intend, in addition to subjecting the offender to an express penalty, also to impose the additional penalty of refusing him any relief on the contract or transactions entered into without compliance with the statute. (Footnotes omitted.)

With the reinstatement of PDQ Lube Center, Lowell Huber's claim that PDQ Lube Center should be barred from the court is now moot.

CONCLUSION

Lowell Huber's Motion to Dismiss Complaint should be denied.

Dated this 20 day of January, 1995.

HILLYARD, ANDERSON & OLSEN



LARRY E. JONES
Attorney for Plaintiff

CERTIFICATE OF SERVICE


I certify that a true and correct copy of the foregoing
was mailed, postage prepaid, on the 20TH day of January,
1995, to the following:

Joseph M. Chambers
Attorney for Defendant
31 Federal Avenue
Logan, UT 84321

L. Brent Hoggan
Attorney for June T. Bowen and
the Estate of Darrell J. Bowen
P. O. Box 525
Logan, UT 84323-0525

Heinz J. Mahler
Kipp & Christian P.C.
Attorney for Pete Riggs and
Bob Riggs
175 East 400 South #330
Salt Lake City, UT 84111-2314

James C. Jenkins
Attorney for Reed Hooley and
Troy Hooley
67 East 100 North
Logan, UT 84321


Secretary

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LAW OFFICES, HILLYARD, ANDERSON & OLSEN, 175 EAST FIRST NORTH, LOGAN, UTAH 84321



753-8895

Application for
Reinstatement of:

Must be typewritten

Check Appropriate Box	Fee
<input checked="" type="checkbox"/> Profit Corporation*	\$60.00
<input type="checkbox"/> Non-profit Corporation	\$30.00
<input type="checkbox"/> Limited Partnership	\$50.00
<input type="checkbox"/> Limited Liability Company	\$50.00

RECEIVED

JAN 17 1993

DIVISION OF CORPORATIONS
STATE OF UTAH

Division of Corporations and Commercial Code
Department of Utah
Hereby certify that the foregoing has been filed
and approved on the 17th day of Jan 1993
in the office of this Division and hereby issue
this Certificate thereof.

Examiner



LKT

Date 1-17-1993

Karla S. Woods
KORLA T. WOODS
Division Director

PDQ LUBE CENTER, INC.

Business Entity Name

I, J. CRAIG HANSEN hereby declare and affirm that.
Name

I am a OFFICER of PDQ LUBE CENTER, INC.
Officer, General Partner or Member Business Name

which was involuntarily dissolved or canceled on the 1ST day of APRIL, 1993, under provisions of Utah law.

I hereby remedy all prior defaults and file herewith a current annual report together with the required annual report and statutory reinstatement fee.

I hereby make application for reinstatement and request the Division of Corporations and Commercial Code of the State of Utah to issue a Certificate of Reinstatement and, under penalties of perjury, I declare that the foregoing statement is, to the best of my knowledge and belief, true and correct.

If the above mentioned corporation name is not available for use at the time of reinstatement, the following corporation name shall be used:

SERVICE 811

PDQ LUBE CENTER, INC.

New Corporation Name

By: x J. Craig Hansen Title: PRESIDENT

Phone Number: (801) 621-6000

Submit the following items with this application:

- An Annual Report showing the new registered agent's signature
- A tax letter of Good Standing from the Utah Tax Commission (if applicable)
- Your filing fee payable to the State of Utah.

State of Utah
Division of Corporations
and Commercial Code
160 East 300 South/Box 45801
Salt Lake City, Utah 84145-0801
(801)530-4849

STATE OF UTAH
DEPARTMENT OF COMMERCE
DIVISION OF CORPORATIONS AND COMMERCIAL CODE



REINSTATEMENT

4-1-93

PROFIT CORPORATION ANNUAL REPORT

THIS FORM MUST BE COMPLETED IN FULL. All profit corporations must file their annual reports and corrections within the month of their anniversary date. Failure to do so will result in Delinquency, Suspension, then Revocation or Involuntary Dissolution of the corporate charter.

CORPORATION FILE # 158004 *service904* INCORPORATED OR QUALIFIED DATE 01-92
CORPORATE NAME PDQ LUBE CENTER, INC.
REGISTERED AGENT J. CRAIG HANSEN
REGISTERED OFFICE ADDRESS 3999 WASHINGTON BOULEVARD
CITY, STATE & ZIP SOUTH OGDEN UTAH 84403

WHEN CHANGING THE REGISTERED AGENT THE NEW AGENT MUST SIGN.

INCORPORATED IN THE STATE AND UNDER THE LAWS OF: UTAH
ADDRESS OF THE PRINCIPAL OFFICE IN THE HOME STATE: 3999 WASHINGTON BOULEVARD UTAH
SOUTH OGDEN 84403

7. BUSINESS PURPOSE:

DOMESTIC PROFIT CORPORATIONS ARE REQUIRED TO LIST A CORPORATE OFFICER.

OFFICERS

8. PRESIDENT J. CRAIG HANSEN
ADDRESS 3999 WASHINGTON BOULEVARD
CITY SOUTH OGDEN STATE UT ZIP 84403
9. VICE PRESIDENT
ADDRESS
CITY STATE ZIP
10. SECRETARY ELIZABETH HANSEN
ADDRESS 3999 WASHINGTON BOULEVARD
CITY SOUTH OGDEN STATE UT ZIP 84403
11. TREASURER
ADDRESS
CITY STATE ZIP

DIRECTORS

12. DIRECTOR J. CRAIG HANSEN
ADDRESS 3999 WASHINGTON BOULEVARD
CITY SOUTH OGDEN STATE UT ZIP 84403
13. DIRECTOR
ADDRESS
CITY STATE ZIP
14. DIRECTOR
ADDRESS
CITY STATE ZIP

Under penalties of perjury and as an authorized officer, I declare that this annual report and, if applicable, the statement change of registered office and/or agent, has been examined by me and is, to the best of my knowledge and belief, true, correct, and complete.

15. BY J. Craig Hansen
16. PRESIDENT
17. JANUARY 19 95

IF THERE ARE NO CHANGES FROM THE PREVIOUS YEAR, AND YOU HAVE ALL CORPORATE REQUIREMENTS FILLED, FOR INFORMATION YOU MAY COMPLETE THE COUPON BELOW, DETACH IT

LK



Michael O. Leavitt
Governor
Olene S. Walker
Lieutenant Governor

UTAH STATE TAX COMMISSION

W. Val Oveson, Chairman
Roger O. Tew, Commissioner
Joe B. Puchaco, Commissioner
Alice Shreiner, Commissioner
Rodney C. Marrelli, Executive Director

January 13, 1995

Department of Commerce
Division of Corporations
P.O. Box 45801
Salt Lake City, Utah 84145-0801

Attention: Kay Thoreson

Dear Ms. Thoreson:

RE: PDQ Lube Center Inc.

Utah Charter #: 158004

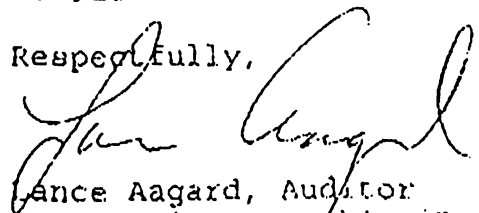
Corporation Franchise Tax Liability

We certify the above named corporation has filed all returns required, and paid all taxes shown thereon to be due. The status of the account is current at this time.

The account is subject to audit and if a liability exists it may be assessed at any time. The issuance of this letter does not fix, abate, or cancel any liability for payment of money due or performance of an obligation to the State of Utah.

This tax clearance is not to be construed as being issued to a corporation dissolving or withdrawing from Utah in accordance with Chapter 10, Article 3, Sections 16-10-77 to 16-10-101 and Sections 16-10-115 to 16-10-116.

Respectfully,


Lance Aagard, Auditor
Corporation Franchise Tax
Account Research and Resolution

Telephone No. 1-801-297-7503



ADDENDUM 5

INC PDQ LUBE CENTER)
)
PLAINTIFF,)
)
vs.)
)
R. LOWELL HUBER)
)
)
DEFENDANT AND)
THIRD-PARTY PLAINTIFF,)
)
vs.)
)
JUNE T. BOWEN, ETAL)
)
)
THIRD-PARTY DEFENDANTS.)

MEMORANDUM DECISION

CIVIL NO. 940000038 PR

HONORABLE BEN H. HADFIELD

ROLL NUMBER:



Memorandum Decision

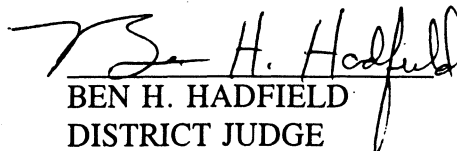
Civil No. 9400000038

Page 2

is not a reinstatement. In this case, the Court defers to the decision of the Utah Division of Corporations, which has clearly determined that Plaintiff receive a reinstatement. Defendant's Motion To Dismiss is denied. Counsel for Plaintiff to prepare an Order in conformance herewith.

DATED this 7 day of February, 1995.

BY THE COURT:


BEN H. HADFIELD
DISTRICT JUDGE

Case No: 940000038 PR

Certificate of Mailing

I certify that on the 10th day of February, 1995,
sent by first class mail a true and correct copy of the
attached document to the following:

LARRY E JONES
Atty for Plaintiff
175 EAST FIRST NORTH
LOGAN UT 84321

JOSEPH CHAMBERS
Atty for Defendant
31 FEDERAL AVENUE
LOGAN UT 84321

District Court Clerk

By: *S. Flake*
Deputy Clerk